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No. 02-69

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,

Petitioners,

v.

JON MICHAEL WITHROW,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

There is no dispute that the parties in this case made an informed and voluntary decision to proceed before the magistrate judge pursuant to 28 U.S.C. §636(c). Specifically, there is no dispute that: (1) the parties were fully and explicitly informed—no less than five separate times—of their right to consent, or not consent, to the magistrate judge's authority; (2) following notice, Withrow—who now seeks to void the jury verdict and judgment—expressly consented to the magistrate judge's authority, both orally and in writing; (3) defendants never contested the magistrate judge's repeated statements of her understanding that all parties had consented to her authority; and (4) defendants made case-dispositive motions that affirmatively invoked the magistrate judge's authority. The real dispute is whether this clear pattern of conduct, along with defendants' written, post-judgment confirmatory consent, satisfies the terms of §636(c), or whether the statute's requirement of "consent" should be expanded to require express or affirmative manifestations of consent through formal written filings.

I. A TECHNICAL DEFECT IN A §636(C) REFERRAL DOES NOT NEGATE THE PARTIES' VOLUNTARY, INFORMED CONSENT AND, THEREFORE, HAS NO EFFECT ON A MAGISTRATE JUDGE'S AUTHORITY.

A. Consent Is a Question of Substance, Not Form.

Withrow mischaracterizes Petitioners' position by claiming that, "in defendant's view, the Magistrates Act does not require pretrial consent." *See* Resp't Br. 24. Roell, Garibay, and Reagan have never disputed that all parties must consent before a magistrate judge can exercise case-dispositive authority under 28 U.S.C. §636(c). That

congressional mandate is clear from the plain terms of the statute, as observed in Petitioners' opening brief. *See, e.g.*, Pet'r Br. 12-13, 29-31 (discussing 28 U.S.C. §636(c)).

The real dispute is over the meaning of consent—specifically, whether §636(c)'s consent requirement implicates a question of form or substance. Arguing in favor of form, Withrow contends that a party who neglects to document consent in a written pretrial filing fails to confer case-dispositive authority on a magistrate judge. But completing a locally prescribed form does not create consent. It merely *confirms* a party's consent to proceed before a magistrate judge. The underlying consent exists separate and apart from the form because, as even Withrow acknowledges, "consent" is an "agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Resp't Br. 14 (quoting BLACK'S LAW DICTIONARY 300 (7th ed. 1999)). And, in crafting §636(c), Congress defined magistrate judges' authority in terms of consent—not execution of a consent form. *See* 28 U.S.C. §636(c)(1).

The plain language of §636(c)(1) belies the notion that consent must be "express" and "affirmative" to confer case-dispositive authority on a magistrate judge. *See, e.g.*, Resp't Br. 17; Pet. App. 3a. Neither adjective appears in the statute. *See* 28 U.S.C. §636(c)(1). Congress required only that magistrate judges' authority be conditioned "[u]pon the consent of the parties" and that such consent be voluntary. *See id.*

The omission of adjectives before "consent" is significant. In the very next sentence of the statute, Congress demonstrated its understanding that "written consent" is a distinct and narrower concept than "consent"—the predicate for §636(c)(1)'s grant of case-dispositive authority to full-time magistrate judges. *See id.*; *cf.* Pet'r Br. 12-15 (contrasting Congress's inclusion of written-consent

requirements in other provisions of the Federal Magistrates Act with §636(c)(1)'s "upon the consent of the parties" language).

Withrow's overview of local rules further highlights that §636(c) does not require consent to be given in a particular form. Indeed, because local rules must be consistent with the statutes they implement, *see* FED. R. CIV. P. 83, the consent variations in local rules implementing §636(c) undermine Withrow's argument that the statute permits only express pretrial consent. *Compare, e.g.*, Resp't Br. App. 1a (referencing Massachusetts local rule requiring written consent within twenty days), *with id.* 5a (noting Oklahoma local rule permitting parties to "consent to magistrate judge jurisdiction at any time during the pendency of the case"), *with id.* 10a (citing New Hampshire local rule under which parties waive their right to an Article III judge by not objecting to magistrate-judge referral within twenty days).

In construing §636(c), this Court should follow the terms of the statute and focus on the substance of consent, not its form. And the Court should decline to engraft additional terms like "express" or "written" onto §636(c)'s consent requirement. Pet. App. 3a-4a, 11a.

Whether parties memorialize consent in a pretrial filing or a post-judgment confirmation, the underlying consent remains the same. And it is that underlying consent that provides a magistrate judge with case-dispositive authority under §636(c). *See* 28 U.S.C. §636(c)(1). Because Congress made consent—not compliance with technical referral procedures—the basis for the grant of case-dispositive authority in §636(c), *compare id., with id.* §636(c)(2), the failure of two defendants to fill out written consent forms prior to judgment did not void the jury's verdict or require the Fifth Circuit to vacate the

final judgment entered by the magistrate judge in this case.

B. The Practical Realities of the Consent Process Should Inform the Court's Construction of §636(c) and Its Determination of the Consequence for Technical Defects in Referral Procedures.

Unable to demonstrate why consent is lacking when parties knowingly and voluntarily litigate the merits of a suit before a magistrate judge, Withrow theorizes that Roell and Garibay secretly withheld consent while outwardly projecting the illusion of agreement to the magistrate judge's authority. But this is not a case in which defendants strategically engineered a defective referral in the hopes of hedging their bets on a jury verdict. Rather, in this case, *all* parties—as well as the district-court clerk, district judge, and magistrate judge—contributed to a series of procedural mishaps that culminated in the magistrate judge's entry of judgment without two defendants' consent forms on file.

First, Withrow neglected to secure all parties' written consent—a duty assigned to plaintiffs under the local rules. *See* S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2 (Br. Opp'n App. 7a). Second, the clerk violated local referral procedures by transmitting to the district judge a consent form that was not signed by all parties. *Id.* Third, the district judge referred the case to the magistrate judge pursuant to §636(c) before any of the defendants had been served, much less consented—which further contravened local rules. *Id.* art. III.B.3 (Br. Opp'n App. 7a); Pet. App. 21a; Resp't Br. 5-6. Fourth, trial counsel for Roell and Garibay—who was assigned this case after it had been referred to the magistrate judge—neglected to check

whether locally prescribed consent forms had been filed on these defendants' behalf.[1] And, fifth, the magistrate judge failed to confirm that all parties' forms were on file before presiding over trial and rendering judgment on the jury's verdict. Pet. App. 19a nn.3-4.

An unfortunate number of errors occurred. But those technical mistakes did not divest the magistrate judge of authority because at no point did she proceed against any party's wishes—*i.e.*, without any party's consent. Instead, the record reflects Withrow's fully informed consent, both orally, J.A. 11, and in writing, Pet. App. 20a—as well as the consent of all defendants, who affirmatively agreed to the magistrate judge's exercise of case-dispositive authority through both their pre-judgment litigation conduct and their post-judgment written confirmation of consent. *See infra* Part I.C; *see also* Pet'r Br. 29-31.

Nothing in the text of §636(c)—or in the history, structure, or purpose of the Federal Magistrates Act—suggests that technical noncompliance with local referral procedures nullifies all proceedings under that section and strips the magistrate judge of authority to enter judgment on a jury

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[1] The assistant attorney general who represented all defendants at trial and at the Fifth Circuit, Charles Eldred, did not handle the case from its inception. At the preliminary *Spears* hearing, Jean Wong attended but was not assigned to the case. J.A. 9, 11. After the district judge referred the case to the magistrate judge, Pet. App. 21a, defendants were served through another assistant attorney general, Lee Haney. J.A. 12. That service of process contained instructions regarding consent. *Id.* Mr. Eldred then was assigned to defend Roell and Garibay and filed answers on their behalf. 2R.541, 560. But he did not investigate whether consent forms previously had been filed. Ultimately, Mr. Eldred also substituted in as counsel for Reagan, J.A. 2, who at the time of service was represented by private counsel who filed both an answer and consent form on Reagan's behalf. 2R.555, 585.

verdict. *See* Pet'r Br. 16-21 (detailing evolution of the Federal Magistrates Act). And, that severe result would be particularly unjustified when, as here, the parties never objected to the magistrate judge's exercise of case-dispositive authority or claimed that their decision to proceed under §636(c) was anything but knowing and voluntary.

When a statutory grant of authority does not specify a consequence for noncompliance, "the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co.*, ___ U.S. ___, 123 S.Ct. 748, 755 (2003) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993)). In §636(c), Congress delegated the task of developing referral procedures to the district courts; but Congress specified no consequence for noncompliance with local, administrative rules. *See* 28 U.S.C. §636(c)(2). Accordingly, this Court should not ascribe a penalty for noncompliance that would defeat Congress's goals of expediting case resolution and promoting judicial efficiency by facilitating consensual referrals under §636(c). Pet'r Br. 16-21; *cf. Barnhart*, 123 S.Ct., at 762 (declining to construe a statutory time limit as a "jurisdictional" constraint on the Commissioner of Social Security's actions because that reading would defeat Congress's funding objective under the Act). Such a penalty would be particularly inappropriate in the context of §636(c), under which Congress conditioned its grant of case-dispositive authority on the existence of consent—not compliance with local referral procedures. Compare 28 U.S.C. §636(c)(1), *with id.* §636(c)(2).

To further both Congress's intent and litigants' expectations, the Court should look to the practical realities of the referral process and recognize that mistakes inevitably will happen, causing technical defects in §636(c) referrals. But provided that a magistrate judge acts under §636(c) with the parties' knowing and voluntary agreement—and no parties

protest that they were coerced or duped into proceeding before the magistrate judge—consent exists under §636(c), and reviewing courts should respect the magistrate judge's authority to preside over a jury trial and enter judgment.

C. The Judgment Below Is Valid Because All Parties Consented to the Magistrate Judge's Case-Dispositive Authority Under §636(c).

Withrow has never contended that he did not knowingly and voluntarily consent to proceed before the magistrate judge. And, although defendants Roell and Garibay did not file consent forms prior to judgment, they affirmatively demonstrated their consent at every stage of the litigation and never once questioned or objected to the magistrate judge's repeated assertions of authority to preside over the case for all purposes, including entry of final judgment. *See, e.g.*, Pet. App. 26a, 27a; *cf. id.* 21a. Nor did they dispute the magistrate judge's stated understanding that all parties had consented to her authority. Pet. App. 27a.; J.A. 18.

Additionally, defendants did more than "not object" to the magistrate judge's actions. They affirmatively invoked the magistrate judge's authority under §636(c) by requesting case-dispositive rulings prior to trial. *See* J.A. 3; 3R.344, 502. And they expressly confirmed consent in a post-judgment filing with the district court. J.A.5; Pet. App. 22a.

1. Defendants' Pre-Judgment Litigation Conduct Was Not "Ambiguous," as Withrow Erroneously Suggests.

Withrow describes defendants' pre-judgment conduct as "ambiguous," Resp't Br. 16, but the record does not support this characterization. Indeed, the magistrate judge herself concluded that defendants "by their actions . . . *clearly* implied their consent to the jurisdiction of a magistrate." Pet. App. 19a (emphasis added).

Striving for ambiguity, Withrow contends that defendants' pretrial participation did not signal consent under §636(c) because they could have believed such proceedings were conducted under §636(b), which "permits magistrates to preside over pretrial proceedings and non-dispositive matters without first obtaining the parties' consent." Resp't Br. 25 (citing 28 U.S.C. §636(b)). But this characterization of the pretrial proceedings ignores defendants' express requests for *dispositive* rulings from the magistrate judge, which could be made only under §636(c)—and with all parties' consent. *Compare* 28 U.S.C. §636(b)(1)(A), *with id.* §636(c)(1).

Defendants' first invocation of the magistrate judge's case-dispositive authority was their motion for summary judgment. 3R.502. When the magistrate judge denied that motion, J.A. 3; Pet. App. 25a, defendants did not question her authority to make that dispositive ruling. Instead, defendants requested reconsideration of the merits of their arguments. *See* J.A. 3; 3R.344. And, when the magistrate judge again denied their motion, 3R.302, defendants did not challenge that second adverse order or contend that the magistrate judge was exercising case-dispositive authority without their consent under §636(c). To the contrary, they voluntarily proceeded to the next case-dispositive litigation stage: jury trial on the merits with the magistrate judge presiding.[2]

Defendants' affirmative, consensual conduct is not contradicted by two pretrial telephone conferences during

[2] At trial, defendants affirmatively invoked the magistrate judge's case-dispositive authority yet again when, prior to the jury's verdict, they asked the magistrate judge to render judgment as a matter of law. 7R.Supp.2. The magistrate judge denied that motion, and, consistent with all previous instances, defendants raised no objection to her authority to make that adverse ruling.

which Withrow claims defendants "never consented" when the magistrate judge discussed the consent predicate of her authority under §636(c). Resp't Br. 25; *see also id.* 6. Withrow omits that these two conferences concerned the need to obtain consent from a newly served defendant—not from any of the parties already proceeding under §636(c). J.A. 15-16, 18-19. Neither Roell, Garibay—nor, for that matter, Withrow or Reagan—discussed their own consent in these telephone conferences because, at that stage, all participating parties' consent had been clearly evidenced and was beyond question.[3]

Indeed, no one raised doubts about Roell and Garibay's consent until after Withrow lost the jury trial, appealed the adverse final judgment, and the Fifth Circuit *sua sponte* remanded the case for a determination on these two defendants' consent. And, as soon as the Fifth Circuit questioned consent, all defendants immediately executed post-judgment confirmation of their pretrial consent, Pet. App. 22a—which should have erased any doubts about their voluntary agreement to proceed under §636(c).

Roell and Garibay's litigation conduct clearly evidenced their consent to proceed under §636(c). And their post-judgment confirmatory consent was consistent with their pretrial actions. These two defendants' failure to file consent forms prior to judgment did not negate their consent and, consequently, did not strip the magistrate judge of authority to enter judgment on the jury's verdict.

[3] Withrow also states that the assistant attorney general who attended the *Spears* hearing "refused to give consent when first asked to do so," Resp't Br. 24, but the record reflects that the attorney had not been assigned to the case and did not represent the defendants, who at that time had not yet been served and, thus, were not even parties to the case. J.A. 2, 11. Accordingly, she could not have consented on any defendant's behalf.

2. Inferring consent from litigation conduct is neither unprecedented nor inconsistent with §636(c).

Defendants not only invoked the magistrate judge's authority through their litigation conduct, but also expressly memorialized their consent in a post-judgment filing. Even without express post-judgment confirmation, however, the magistrate judge had case-dispositive authority because defendants' litigation conduct manifested the consent necessary to satisfy §636(c).

Contrary to Withrow's assertion, defendants have never stated that inferred consent under §636(c) "is not sufficiently 'protective of Congress' voluntariness concerns.'" Resp't Br. 17. Rather, defendants acknowledged that requiring post-judgment confirmatory consent—in addition to inferred consent from litigation conduct—provides a "*more* protective" approach for ensuring parties' voluntary agreement to proceed under §636(c). Pet'r Br. at 35 n.13 (emphasis added). Defendants also have observed, however, that when a case is referred to a magistrate judge with the parties' full knowledge that the referral encompasses trial and entry of judgment—and the parties voluntarily proceed without objection and without demanding to be heard by an Article III judge—the magistrate judge acts, for all practical purposes, with the parties' consent. *See id.* at 32 n.12.[4]

[4] Although Withrow contends that inferred consent would impermissibly transform §636(c) into an "opt-out" statute, that objection is flawed on two levels. First, litigants who affirmatively invoke a magistrate judge's case-dispositive authority are not passive participants but actively "opt in" to a §636(c) proceeding through their litigation conduct. Second, even if an "opt-out" approach were taken under §636(c), it would be consistent with the statute. *See* Pet'r Br. at 32 n.12 (discussing why opt-out referral procedures comport with Congress's voluntariness concerns under §636(c)). Indeed, the Judicial Conference Committee on the Administration of the Magistrate Judges System expressly endorses use of opt-out procedures "to further the goal of maximizing the consent jurisdiction of magistrate judges in civil cases." JUDICIAL CONFERENCE COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM 3-4 (Supp. 1994). Withrow erroneously contends that the Committee rejects an opt-out approach under §636(c), *see* Resp't Br. 15 n.7, but he references a proposal the Committee declined to adopt in 1991. *Id.* (citing Magistrate Judges Division of the Administrative Office of the United States Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 305 (1993)). Three years later, the Committee expressly endorsed the use of opt-out referral procedures. *See* LONG RANGE PLAN at 3-4.

Inferred consent is not the radical notion Withrow suggests.[5] In *Peretz v. United States*, for example, the Court held that *voir dire* in a felony jury trial may be delegated to a magistrate judge pursuant to §636(b)(3) "when the litigants consent"—including when a defendant "fails to demand the presence of an Article III judge." 501 U.S. 923, 933, 936-37 (1991).[6] Similarly, outside the magistrate-judge context, the

[5] Nor does Federal Rule of Civil Procedure 73 preclude inferred consent. *See* Resp't Br. 15. That rule directs parties to file written consent forms, but it does not establish the *authority* of a magistrate judge to proceed under §636(c). That authority emanates, instead, from the statute's consent requirement. *See* 28 U.S.C. §636(c)(1). Although federal rules have the force of law, the particular rule at issue—Rule 73—prescribes no consequence for noncompliance. *See* FED. R. CIV. P. 73. Accordingly, the Court should not interject a rule-based penalty that nullifies §636(c) authority whenever consenting parties fail to file forms pursuant to Rule 73. *See supra* Part I.A. If that penalty applied, magistrate judges automatically would forfeit case-dispositive authority in every jurisdiction in which local rules do not require written consent, as does Rule 73. *See, e.g.*, C.D. ILL. R. 72.1(A)(9); D.N.H. R. 73.1(b)(2)(B). And that would be inconsistent with Congress's directive that district courts develop their own local rules for ensuring the voluntariness of parties' consent. 28 U.S.C. §636(c)(2).

[6] As the Court noted in *Peretz*, parties frequently waive constitutional rights through their failure to object. *See* 501 U.S. 923, 936-37 (citing *United States v. Gagnon*, 470 U.S. 522, 528 (1985) (right to be present at all stages of criminal trial), *Levine v. United States*, 362 U.S. 610, 619 (1960) (right to public trial), *Segurola v. United States*, 275 U.S. 106, 111 (1927) (right to be free from unlawful search and seizure),

Court has inferred a party's consent to a non-Article III decisionmaker from affirmative litigation conduct in a non-Article III forum. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849-50 (1986) (noting that party's decision to proceed before the commission rather than pursue relief in state or federal court "constituted an effective waiver" of any right to trial in an Article III court on a counterclaim).

Inferred consent also is appropriate because the parties' agreement to proceed before a magistrate judge is, in essence, a "matter of contract." *See Archie v. Christian*, 808 F.2d 1132, 1134 n.2 (CA5 1987) (en banc). And contract principles permit a party's affirmative conduct to signify consent. In the formation of contracts, for example, parties can fulfill the requisite "[m]anifestation of mutual assent" by beginning or rendering performance. RESTATEMENT (SECOND) OF CONTRACTS §18 (1981). Conduct can communicate a party's acceptance of an offer and create a binding obligation. *Id.*, §19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *see also id.*, cmt. a ("Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise."); *id.*, §4 (permitting a promise to be "inferred wholly or partly from conduct"). Thus, when—as in this case—all parties are on notice that the magistrate judge is exercising case-dispositive authority, and all

United States v. Figueroa, 818 F.2d 1020, 1025 (CA1 1987) (right not to be subjected to unlawful post-arrest delay), *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (right to double jeopardy defense), *United States v. Coleman*, 707 F.2d 374, 376 (CA9 1983) (right not to incriminate oneself), and *Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.")).

voluntarily proceed on dispositive motions and a jury trial, the parties' "manifestation of mutual assent" establishes their agreement—*i.e.*, their consent—to litigate pursuant to §636(c).

Moreover, construing §636(c) to permit inferred consent offers the added benefit of preventing gamesmanship—which Withrow, like the Fifth Circuit, emphasizes as a concern. In this respect, inferred consent may be more appealing than either a post-judgment or express-pretrial consent approach—neither of which fully resolves gaming concerns. *See Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (CA7 1995); *see also Caprera v. Jacobs*, 790 F.2d 442, 445 (CA5 1986) (per curiam).[7]

An inferred-consent approach would prevent gamesmanship by preventing parties who knowingly and voluntarily proceeded to trial before a magistrate judge from denying consent upon receipt of an adverse verdict.[8] Instead, consent would be reflected in the parties' affirmative litigation conduct, establishing the magistrate judge's

[7] Withrow claims that permitting post-judgment confirmatory consent would make retrials "the normal operation of the rule," Resp't Br. 20, but that has not happened in circuits like the Seventh and Eleventh that accept post-judgment consent. Instead, only a handful of examples exist. *See, e.g., Rembert v. Apfel*, 213 F.3d 1331, 1335 & n.1 (CA11 2000). And, while Withrow's pretrial, express-consent construction of §636(c) similarly has not spawned a large body of jurisprudence, case law documents that gamesmanship occurs under Withrow's proposed approach as well. *See Caprera*, 790 F.2d, at 445.

[8] A party might argue that its affirmative litigation conduct did not evidence a knowing and voluntary agreement to proceed before the magistrate judge; but that party would have to rebut the inference of consent that otherwise is legitimately drawn when parties are on notice that a magistrate judge is exercising §636(c) authority and those parties proceed through judgment on the merits. In this case, of course, neither Withrow nor any of the defendants suggest that they did not voluntarily and knowingly consent to proceed before the magistrate judge pursuant to §636(c).

case-dispositive authority under §636(c).[9] Thus, if eliminating gamesmanship is the goal in construing the statute's consent requirement, the Court should read §636(c) to permit inferred consent and hold parties to the bargain they struck when they voluntarily proceeded to trial before a magistrate judge.

D. The Referral Defects in This Case Do Not Implicate Constitutional Concerns.

Withrow contends that the doctrine of constitutional avoidance requires rejection of defendants' construction of §636(c), but this argument rests on the fiction that defendants' approach would permit magistrate judges to exercise case-dispositive authority without all parties' consent. *See* Resp't Br. 24 (arguing that "defendants' view [that] the Magistrates Act does not require pretrial consent" casts "constitutional doubt on the entire referral process"). As previously discussed, defendants agree that Congress conditioned its grant of case-dispositive authority under §636(c) on the parties' knowing and voluntary consent to proceed before a magistrate judge. *See supra* Part I.A. Accordingly, defendants' construction of §636(c) raises no constitutional concerns.[10]

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[9] An inferred-consent approach may not have the immediate appeal of a bright-line rule, and sound policy reasons may well favor local adoption of clear-cut, written-consent requirements. But an inadvertent failure to comply with a local precautionary measure should not be deemed to divest a magistrate judge of all statutory authority, as that would be contrary to the plain language and purpose of §636(c). Nor should such a procedural error render a jury verdict a nullity when no party objects.

[10] At base, Withrow's argument is an attempt to back-door a constitutional challenge to §636(c) that is not before the Court because it was not included in the question presented on certiorari and was neither pressed by Withrow nor passed upon by the courts below, depriving the Court of "the benefit of a full record or lower court determinations." *Lytle v. Household Mfg.*, 494 U.S. 545, 551 n.3 (1990); *see, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38-39 (1989); *see also* Reply to Br. Opp'n 7-9.

II. Local Rules Do Not Provide Alternative Grounds for Affirmance.

Withrow erroneously argues that the Court should affirm the Fifth Circuit's judgment on the alternative ground that defendants failed to file written pretrial consent as required by the Southern District of Texas local rule. As Withrow concedes, this argument was never raised in the courts below. Resp't Br. 28 n.9. Accordingly, it is not properly before this Court. *See, e.g., Matsushita*, 516 U.S., at 379 n.5; *Demarest*, 498 U.S., at 188-89; *Lytle*, 494 U.S., at 551 n.3; *Granfinanciera*, 492 U.S., at 38-39.[11]

Nor, as Withrow suggests, is the local-rule issue so "intertwined" with the meaning of "consent" under §636(c) that it must be considered by the Court. Resp't Br. 28 n.9. The statute conditions magistrate judges' authority on the parties' consent, not compliance with local rules. *Compare* 28 U.S.C. §636(c)(1), *with id.* §636(c)(2); *see supra* Part I.A. Thus, even if Withrow's local-rules argument had been preserved, it is immaterial to whether the magistrate judge had case-dispositive authority under §636(c). *Cf. Parks v. Collins*, 736 F.2d 313, 314-15 (CA5 1984) (confirming that magistrate judges' authority stems from the parties' consent and that noncompliance with local referral rules does not negate consent when parties freely and voluntarily proceeded before the magistrate judge).

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[11] Withrow's *pro se* status in the courts below does not excuse his failure to preserve this argument. *See McNeil v. United States*, 508 U.S. 106, 113 (1993) (explaining that "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel").

Moreover, Withrow faults defendants for failing to file their consent forms but ignores his own violation of the local rules, which assign plaintiffs the burden of securing all parties' written consent. S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2 (Br. Opp'n App. 7a). It would be perverse for Withrow to obtain a new trial—based on a local-rule violation—when he himself failed to obey the local rules.

Certainly, all parties—as well as the clerk of court, district judge, and magistrate judge, *see supra* Part I.B—should have abided by local referral procedures designed to ensure the voluntariness of parties' conduct. *See* 28 U.S.C. §636(c)(2); FED. R. CIV. P. 73. But this technical error is harmless when no party—including Withrow—contends that the magistrate judge proceeded without that party's knowing and voluntary consent. *Cf. Parks*, 736 F.2d, at 314-15; *Johnson v. Manhattan Ry. Co.*, 61 F.2d 934, 938 (CA2 1932) (noting, in rejecting challenge to judge's authority based on alleged rule violation, that "for obvious practical reasons not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end").

III. APPELLATE COURTS SHOULD NOT REVIEW CONSENT UNDER §636(C) *SUA SPONTE* OR VACATE JUDGMENTS BASED ON TECHNICAL REFERRAL DEFECTS TO WHICH NO PARTY OBJECTS.

Withrow concedes that a defect in referral procedures under §636(c) does not implicate subject-matter jurisdiction. Resp't Br. 29. Nonetheless, Withrow strains to defend the Fifth Circuit's *sua sponte* consideration of consent by suggesting that magistrate-judge authority under §636(c)

is "akin" to subject-matter jurisdiction. *Id.* Tellingly, Withrow cites no authority for this proposition.[12]

Nor does *sua sponte* consideration of consent derive support from *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), which involved subject-matter jurisdiction—an issue Withrow concedes is not at issue under §636(c). Resp't Br. 29. Additionally, Withrow misplaces reliance on an assortment of criminal cases in which defendants objected to alleged trial-court errors and in which, therefore, this Court did not address the propriety of *sua sponte* review. *See Gomez v. United States*, 490 U.S. 858, 876 (1989); *Wingo v. Wedding*, 418 U.S. 461, 465-66 (1974); *Silber v. United States*, 370 U.S. 717, 718 (1962).[13]

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[12] Defendants did not waive their challenge to the Fifth Circuit's *sua sponte* investigation of consent by not protesting that action in the district court or in subsequent appellate briefing. Resp't Br. 28-29. Because the Fifth Circuit already had addressed consent as a jurisdictional inquiry in its *sua sponte* limited remand order, defendants had no avenue to challenge the legal foundation of that order, which bound the district court and framed the consent inquiry for the Fifth Circuit merits panel. In Fifth Circuit briefing, defendants tracked language in the Fifth Circuit's limited remand order, noting in the "Standard of Review" section that "jurisdictional questions" are reviewed *de novo*. *See* Appellees' Br. 2, *Withrow v. Roell*, No. 00-40627, in the U.S. Court of Appeals for the Fifth Circuit. But the issues and argument sections consistently framed questions in terms of the *magistrate judge*'s jurisdiction (*i.e.*, authority) to conduct the trial and to enter judgment—not the existence of subject-matter jurisdiction over Withrow's §1983 suit. *See id.*, 1-5.

[13] Withrow argues that appellate courts should investigate consent *sua sponte* because a judgment rendered by a magistrate judge without consent is "of no force and effect" and "cannot be overlooked." Resp't Br. at 40-41. But, if a judgment truly is rendered without a party's consent—*i.e.*, without that party's voluntary agreement—the party need only object to alert the district and appellate courts to that defect. *Sua sponte* investigation serves no salutary purpose in that instance. Instead, it will tend to uncover, as in this case, technical defects in referral procedures that do not void the parties' underlying consent and, therefore, do not affect the magistrate judge's authority. If, however,

Similarly inapplicable is *Glidden Co. v. Zdanok*, which involved an unpreserved constitutional challenge to the authority of judges appointed to the Court of Claims and Court of Customs and Patent Appeals. 370 U.S. 530, 535-36 (1962). *Glidden* is inapposite for two reasons. First, Withrow does not challenge the constitutionality of §636(c) in this case. *See supra* Part I.D & note 10. And, second, the Court in *Glidden* merely permitted a party to raise a constitutional-authority challenge for the first time on appeal. The case did not involve *sua sponte* appellate investigation of a lower-court judge's authority. *See id.*

Another authority-related case on which Withrow misplaces reliance is *Frad v. Kelly*, 302 U.S. 312 (1937), which invalidated an order issued by a judge who lacked statutory authority to revoke probation and terminate proceedings under the Probation Act. This defect in authority was substantive because the judge's order fell not only outside the scope of the Act's grant of authority, but also outside the subject-matter jurisdiction of the court in which the judge sat. *Id.*, at 316-19. In Withrow's case, by contrast, the magistrate judge acted within the scope of §636(c)'s grant of authority because all parties knowingly and voluntarily agreed to proceed before the magistrate judge. *See* 28 U.S.C. §636(c)(1).[14] Any procedural defect in the referral

appellate courts do consider consent *sua sponte* and find consent lacking, the proper action would be to treat the judgment as an interlocutory report and recommendation and dismiss for lack of appellate jurisdiction, *see, e.g., Rembert*, 213 F.3d, at 1335—not to vacate the trial-court judgment, as did the Fifth Circuit in Withrow's appeal.

[14] Additionally, the objecting party in *Frad* was a United States Attorney acting on the public's behalf, and the Court has subsequently limited *Frad*'s holding to that factual circumstance. *See Glidden*, 370 U.S., at 535. In Withrow's case, of course, that defining element is absent.

process did not strip the magistrate judge of authority or divest the district court of subject-matter jurisdiction over Withrow's §1983 suit.[15]

Moreover, when, as in this case, a defect in a magistrate-judge referral is purely technical, the judgment should be respected under the "*de facto* officer" doctrine. That doctrine confers validity upon acts performed under color of official title even if minor deficiencies are later discovered in the person's appointment or election to office. *See, e.g., Glidden*, 370 U.S., at 535; *McDowell v. United States*, 150 U.S. 596, 602 (1895); *Ball v. United States*, 140 U.S. 118, 128-29 (1891). By giving effect to such acts, the *de facto* officer doctrine promotes finality and conservation of judicial and litigant resources, preventing litigants from "abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." *Glidden*, 370 U.S., at 535.

Because the magistrate judge who presided over Withrow's trial was a "full-time judicial officer . . . specially designated" to exercise case-dispositive authority pursuant to §636(c)(1)—and because she and all parties proceeded on the

[15] Even assuming that the absence of two defendants' consent forms is a non-jurisdictional "structural" defect, as Withrow claims, *see* Resp't Br. 29, Withrow waived the issue by not raising it in the district court. As Justice Scalia has observed, "[a] party forfeits the right to advance on appeal a nonjurisdictional claim, structural or otherwise, that he fails to raise at trial." *Freytag v. Comm'r of Internal Rev. Serv.*, 501 U.S. 868, 893 (1991) (Scalia, J., concurring). The *Freytag* majority considered an Appointments Clause challenge to a tax-court judge, noting that *Glidden* had included that specific type of challenge among the non-jurisdictional, structural constitutional objections that can be considered even if not preserved below. The Court stated, however, that this was a "rare" case warranting discretionary consideration. *Id.*, at 878-79. And the Court did not decide whether, as Justice Scalia urged, structural constitutional claims are forfeited if not timely raised. *See id.*, at 893 (Scalia, J., concurring).

shared (albeit erroneous) understanding that the requisite consent forms had been properly filed with the clerk of court—the *de facto* officer doctrine immunized the trial-court judgment from attack based on a technical defect in referral procedures. *See Glidden*, 370 U.S., at 535; *McDowell*, 150 U.S., at 602; *Ball*, 140 U.S., at 128-29. Moreover, to the extent any defect was not immunized under that doctrine, it was cured when defendants filed their post-judgment confirmatory consent. There was no basis for the Fifth Circuit to investigate consent *sua sponte* and vacate the final judgment when no party claimed the magistrate judge proceeded without that party's voluntary consent.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment.

Respectfully submitted,

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